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IN THE

Supreme Court of the United States

October Term, 1952

No. 517

OLIVE B. BARROWS, RICHARD PIKAAR and M. M. O'GARA,
Petitioners,

vs.

LEOLA JACKSON,
Respondent.

BRIEF FOR PETITIONERS.

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Respondent.

BRIEF FOR PETITIONERS.

Opinions Below.

The Memorandum Opinion of the trial court [R. 8-16] is unreported. The opinion of the District Court of Appeal [R. 30-56] is reported in 112 Cal. App. 2d 534, 247 P. 2d 99. Rehearing denied September 4, 1952. Hearing in the Supreme Court of the State of California denied October 2, 1952, by a vote of four to three [R. 58].

Jurisdiction.

The order of the Supreme Court of the State of California denying petitioners' petition for hearing was entered on October 2, 1952. (*American Railway Express Co. v. Levee*, 263 U. S. 19, 20-21.) Three of the seven justices were of the opinion that a hearing should be

granted [R. 58]. The jurisdiction of this Court is invoked under 28 U. S. C. A., Secs. 1257(3) and 2101(c).

The right of equal protection of the laws and the right to the due process of law claimed under the Fourteenth Amendment to the Constitution of the United States was specifically set up by defendant and respondent in her demurrer to plaintiffs' second amended complaint [R. 8] in the following language:

> "Said second amended complaint and each cause of action therein set forth does not state facts sufficient to constitute a cause of action under the proposition that entertainment of this suit would deny the defendant the equal protection of the laws guaranteed by the Fourteenth Amendment to the Constitution of the United States.
>
> "Said second amended complaint and each cause of action therein set forth does not state facts sufficient to constitute a cause of action under the proposition that entertainment of this suit would deny the defendant due process of law guaranteed by the Constitution of the United States."

The above rights were urged by respondent in her reply brief in the District Court of Appeal.

The above federal questions were passed upon by the District Court of Appeal in respondent's favor in the following language:

> [R. 32.] "We first consider whether a cause of action is stated for damages for breach of contract under common law principles."
>
> [R. 34.] "We hold that apart from the constitutional issue the complaint states a cause of action for damages."

[R. 54.] "The fact that the non-Caucasian is not a party to the action, and that an award of damages operates against the covenantor directly rather than directly against the non-Caucasian, does not affect the result. In an action at law for damages the rights and interest of the particular non-Caucasian would be secure and unaffected by any judgment rendered. However, enforcement of the covenant would effectively deny non-Caucasian citizens equality in the enjoyment of property rights because property owners in restricted areas are deterred from permitting use or occupancy by non-Caucasians lest they be personally liable for damages. No person has the right, nor does the state have the power, to require the enforcement of a covenant which will result in the denial to any individual of the equal protection of the laws. Any recognition of a racial restrictive covenant in an action in a state court constitutes prohibited state action."

The right, privilege or immunity of petitioners under the Fourteenth Amendment to the Constitution of the United States against being deprived of property without due process of law was set up in the trial court,[1] in petitioners' opening brief in the District Court of Appeal,[2]

---

[1]Petitioners' Points and Authorities in opposition to respondent's demurrer at page 21:

"As an additional reason why the demurrer filed by the defendants should be overruled, plaintiffs respectfully submit that the refusal of the court to allow them to recover such actual damages as can be proved to have resulted from the breach of the agreement alleged would deprive plaintiffs of property without due process of law, in violation of the Fourteenth Amendment to the Constitution."

[2]Appellants' Opening Brief, pages 68-71:

"9. Refusal of Remedy will Deprive Appellants of Valuable Property Rights Without Due Process of Law in violation of the Fourteenth Amendment to the Constitution of the United States."

and in petitioners' petition for hearing in the Supreme Court of the State of California [R. 19 and 23], and in Petitioners' Petition for Writ of Certiorari at page 3.

The above federal question was passed upon unfavorably to the petitioners by the District Court of Appeal in the following language:

> [R. 33, note 3.] "Agreements such as here involved have heretofore been held to constitute a lawful exercise of the freedom to contract (and) as such to be enforceable by the courts."
>
> [R. 34.] "We hold that apart from the constitutional issue the complaint states a cause of action for damages."
>
> [R. 34.] "The parties agree, as they must, that the covenant as such, is constitutionally a valid agreement; . . ."
>
> [R. 55.] "The denial of access to the courts does not deprive plaintiffs of their property without due process of law."

The right of petitioners to make and enforce contracts guaranteed as a civil right under the equal protection clause of the Fourteenth Amendment to the Constitution of the United States was set up and claimed by petitioners' reply brief in the District Court of Appeal of the State of California, Second Appellate District,[3] and in petitioners' petition for a rehearing [R. 17] and in petitioners' petition for hearing in the Supreme Court of California [R. 19, 20 and 23] and in Petitioners' Petition for Writ of Certiorari at page 5. This federal question was not passed upon by the state courts.

---

[3] "It is plain, therefore, that the only civil right involved in this case is the 'right to make and enforce contracts.'"

The right, privilege and immunity of petitioners under Article I, Section 10, of the Constitution of the United States against the impairing by any state of the obligation of contracts was raised when first it appeared that this right had been violated, *i. e.*, in petitioners' opening brief in the District Court of Appeal[4] and in petitioners' petition for rehearing [R. 17] and in petitioners' petition for hearing in the Supreme Court of the State of California [R. 20 and 25] and in Petitioners' Petition for Writ of Certiorari at page 5. This federal question was not passed upon by the state courts.

Questions Presented.

1. Would a judgment for damages against respondent for breach of her own valid racial restrictive agreement deny her (not another or others) equal protection of the laws, or deprive her (not another or others) of life, liberty, or property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States?

2. Has the State of California deprived petitioners of property without due process of law and denied petitioners the civil right to make and enforce contracts, contrary to the due process clause and equal protection of the laws clause of the Fourteenth Amendment to the Constitution of the United States or impaired the obligations of contract, contrary to Article I, Section 10, of the Constitution of the United States?

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[4]Appellants' Opening Brief, pages 71-73:

"10. Refusal by a court to Grant Any Remedy Against a Party to a Valid Contract for the Breach Thereof is an Exercise of a Legislative Prerogative and Would Impair the Obligation of Contract in Violation of Article I, Section 10 of the United States Constitution. . . ."

Statement of the Case.

On or about the 21st day of October, 1944, petitioners Barrows [R. 1] and O'Gara [R. 2] and the ancestor in title of petitioner Pikaar [R. 2], and respondent Leola Jackson [R. 2], each owned lots in Tract 1462 in the City of Los Angeles. On or about that date, in consideration of the mutual benefit to themselves and their respective properties, said owners, including respondent, executed and caused to be recorded an "agreement imposing restrictions" [R. 2]. By the terms of said agreement each of the signers promised and bound himself, his heirs, executors, administrators, successors and assigns, by a continuing covenant, that no part of his said real property described therein should ever at any time be used or occupied by any person or persons not wholly of the white or Caucasian race [R. 3]. By the terms of said agreement each of the signers further promised that this restriction should be incorporated in all papers and transfers of lots or parcels of land of said signers [R. 3].

On or about February 2, 1950, respondent, Leola Jackson, and one Dorothy May Grace, executed a grant deed to Pearnell Smalley and Florine Smalley [R. 4]. Respondent, Leola Jackson, failed to incorporate in said deed the restriction contained in said agreement against use and occupancy by persons not wholly of the white or Caucasian race, which failure constituted the first breach of respondent's contract complained of by petitioners [R. 5].

On or about September 4, 1950, persons not of the white or Caucasian race moved into and began to use and occupy the property as to which respondent had contracted that it would never at any time be used or occupied by persons not of the white or Caucasian race

[R. 4]. Said use and occupancy on or about and after the 4th day of September, 1950, constituted the second breach of respondent's contract complained of by petitioners. As a result of the breaches of contract, and each of them, petitioners have suffered actual and severe depreciation in the value of their property, as alleged in their second amended complaint [R. 5 and 6]. Respondent's demurrer was sustained without leave to amend [R. 16]. The judgment sustaining respondent's demurrer was affirmed [R. 56].

Specification of Errors to Be Urged.

The District Court of Appeal of the State of California, Second Appellate District erred:

1. In enlarging the holding in *Shelley v. Kraemer* (1948), 334 U. S. 1, by erroneously interpreting it to apply to the radically different facts of the case at bar, and ignoring the distinctions urged in the briefs of petitioners in the restrictive covenant cases, and apparently adopted by the opinions therein.

2. In basing its opinion upon the speculative effect of a judgment for petitioners upon persons unknown, not parties to the action, and in failing to base its opinion upon the rights of respondent alone.

3. In failing to follow the rule of *Walker v. Whitehead*, 83 U. S. 314, 21 L. Ed. 357, that the ideas of validity of a contract and remedy against the original contracting party for its breach are inseparable and are both parts of the right which is guaranteed by the Constitution of the United States.

4. In affirming the judgment of the Superior Court.

Summary of Argument.

Petitioners feel that the Court below has enlarged the holding in *Shelley v. Kraemer* (1948), 334 U. S. 1, beyond the facts and reasoning disclosed in the opinion in that case. All authorities cited in *Shelley v. Kraemer* (*supra*) were cases where state action was taken either by a legislative or a judicial arm of a state against individuals who had not consented to that action. Such authorities can not logically be applied to an action to recover compensatory damages from an original party signatory to a valid contract. A limitation on the opinion in the Restrictive Covenant Cases[5] seems to be indicated by the language of the opinions particularly when viewed in relation to the contentions made in the briefs in those cases.

In addition to what petitioners feel was an erroneous extension of the above mentioned opinions, the Court below found it necessary to base its decision upon the rights of persons unknown not parties to this action in order to apply its interpretation of the opinions in the Restrictive Covenant Cases. This objection is made with all due respect to the Court below. The rights of the litigants were not the bases for the opinions.

The only constitutional right which respondent urged in the Court below was her alleged right to dispose of her property. The opinion of the District Court of Appeal, Second Appellate District, State of California, does not hold that the relief sought by petitioners would deprive *respondent* of the equal protection of this right

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[5] *Shelley v. Kraemer* and *McGee v. Sipes*, 334 U. S. 1, and *Hurd v. Hodge* and *Hurd v. Urciolo*, 334 U. S. 24.

nor any other. And in fact, respondent has exercised this right in full and petitioners do not complain of that fact. Petitioners complain that a contingency has occurred which respondent promised by a valid contract would not occur. Petitioners seek an opportunity to prove the extent of their actual loss as a result of that occurrence. By her valid contract respondent has sold whatever property right which it might be construed to have deprived her. Respondent had a constitutional right to dispose of all or any part of her property and she exercised that right.

Petitioners and respondent had a constitutional right to contract in the manner alleged in plaintiff's complaint and said contract was and is valid according to the laws of the State of California as the opinion of the Court below held "that apart from the constitutional issue the complaint states a cause of action for damages." [R. 34.] Under these circumstances respondent would not be denied the equal protection of any constitutional right by the state action sought by petitioners. Whereas, by refusing to require respondent to go to trial upon the second amended complaint, petitioners have been deprived of the property and civil right to make and enforce their valid contract.

> "The policy of protecting contracts against impairment *presupposes the maintenance of a government by virtue of which contractual relations are worth while,*— . . . ." (Emphasis added.)
>
> *Home Building & Loan Assn. v. Blaisdell* (1933), 290 U. S. 389, 435; 78 L. Ed. 357, 427.

ARGUMENT.

I.

Restrictive Covenant Cases.

Petitioners respectfully submit that in the cases of *Shelley v. Kraemer* and *McGee v. Sipes* (1948), 334 U. S. 1, and *Hurd v. Hodge* and *Hurd v. Urciolo* (1948), 334 U. S. 24, commonly called the Restrictive Covenant Cases, as understood by these petitioners,[6] this Court decided (1) That "among the civil rights intended to be protected from discriminatory state action by the Fourteenth Amendment are the rights to acquire, enjoy, own and dispose of property";[7] (2) That the action of the state courts in enforcing the covenants was state action to be tested by the Fourteenth Amendment to the Constitution of the United States; (3) That the petitioners in those cases were denied equal protection of their rights to acquire, enjoy, own and dispose of property by the judgment of the lower courts enforcing against them contracts to which *none of the petitioners were parties,* and (4) That the respondents in those cases did not have a constitutional right to state action which would deprive those petitioners of equal protection in their right to acquire, enjoy, own and dispose of property.

By far the major portion of the opinion in *Shelley v. Kraemer* is devoted to the second of the propositions, to-wit, that court action is state action. The opinion in *Hurd v. Hodge* approved the four propositions referred to hereinabove and considered two other principles which

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[6]Petitioners realize, of course, that this court knows best how its opinion should be understood.

[7]*Shelley v. Kraemer,* 334 U. S. 1, 10 [R. 37], 19 [R. 39].

have no relevancy to the case at bar originating in a state court, *i.e.*, (1) Section 1978 of the Revised Statute derived from Section 1 of the Civil Rights Act of 1866, and (2) the policy of federal courts: "It is not consistent with the public policy of the Unied States to permit federal courts in the nation's capital to exercise general equitable powers to compel action denied the state courts where said action has been held to be violative of the guarantee of the equal protection of the laws." (*Hurd v. Hodge*, 334 U. S. 24, 35.)

Neither of these opinions expresses the third proposition referred to hereinabove in the language used above, but no exception thereto is likely to be taken by respondent except to the last phrase thereof: "to which none of the petitioners were parties." Neither of these opinions expressly spells out this limitation upon the opinions, but it is respectfully submitted that petitioners may infer such a limitation from the following: (1) The consistent application of all language to "these petitioners," or "petitioners" or "these cases." (2) The recognition that there were two distinct questions, (a) whether the court action therein was state action, (b) whether the state action in those "cases" deprived those "petitioners" of equal protection of constitutional rights.[8] (3) The state action in

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[8]"Against this background of judicial construction, extending over a period of three-quarters of a century, we are called upon to consider whether enforcement by state courts of the restrictive agreements *in these cases* may be deemed to be acts of those states; and if so, whether that action has denied *these petitioners* the equal protction of the laws which the amendment was intended to insure." (Emphasis added.)

Shelley v. Kraemer, 334 U. S. 1, 18.

"It is state action of a particular character that is prohibited."

Corrigan v. Buckley, 271 U. S. 323, 330.

those "cases" deprived those "petitioners" of equal protection of the constitutional rights to acquire, enjoy, own or dispose of property, whereas the relief sought in the case at bar would not deprive respondent of any such rights, as will appear more clearly hereinafter. (4) The use of this condition on page 20:

> "And when the effect of that action is to deny rights subject to the protection of the Fourteenth Amendment it is the obligation of this court to enforce the constitutional command."

(In the case at bar the only "rights subject to the protection of the Fourteenth Amendment" are the rights of the petitions and respondent to contract.) (5) The express affirmance of *Corrigan v. Buckley,* 271 U. S. 323, as to the validity of the covenant in question and the application of the *Civil Rights Cases,* 109 U. S. 3, on the same point. (6) The self-evident conclusion that a valid contract can be enforced in some way against someone. (7) All authorities cited are examples of state action without the consent of the litigant challenging it and could not logically be cited in a case involving actual consent by respondent by valid contract for consideration already received and enjoyed. The reasoning was appropriate to the court action in those cases but not to all court action and seems to be so limited.

The controlling significance of the fact that none of the petitioners were parties to the contracts and an explanation for the failure of the opinions to be more explicit both become apparent from an analysis of the briefs

for the various petitioners filed in the Restrictive Covenant Cases.

In the brief for petitioners in *McGee v. Sipes*, the only question presented was:

> "Does enforcement by state courts of an agreement restricting the disposition of land by prohibiting its use and occupancy by members of unpopular minority groups *where neither the willing seller nor the willing purchaser was a party to the agreement imposing the restriction* violate the Fourteenth Amendment and treaty obligations under the United Nations Charter?" (Emphasis added.)

Pages 40 and 41 of the same brief contain the following:

> "THE FACT THAT NEITHER PETITIONERS NOR THEIR GRANTORS WERE PARTIES TO THE COVENANT FURTHER EMPHASIZES THE STATE'S RESPONSIBILITY AND PREDOMINANT ROLE IN THE ACTION TAKEN AGAINST THEM.
>
> "Petitioners' grantors have not at any time agreed to refrain from selling their property to Negroes. The restrictive agreement upon which the court predicated its order directing the petitioners to move from their home was signed in 1934 by predecessors in title of petitioners' grantors. Neither petitioners nor their grantors are parties to the agreement.
>
> "If any doubt exists as to the extent or significance of state action involved in court enforcement of a racial restrictive agreement as to occupancy of land between original parties to the agreement, an exam-

ination of the history of 'covenants running with the land' reveals that *insofar as they impose obligations on third persons such covenants are wholly the creature of equity.* . . .

". . . *the rights thus enforced against third persons find their basis in the powers of courts of equity alone.* . . ." (Emphasis added.)

Of special significance at this point are the following statements by one of the co-authors of the above mentioned brief in *McGee v. Sipes* which appears in 7 Lawy. Guild Rev. 99 (May-June, 1947), "Race Restrictions on Ownership or Occupancy of Land," at page 108:

"It is, of course, true that any man may contract freely with reference to his own property. He may even bargain away his own constitutional rights in the process. . . . Whoever wills may traffic in his own constitutional rights. *He may not similarly hawk the rights of others.*" (Emphasis added.)

The significance of the fact that petitioners were not parties to the covenant is emphasized in the consolidated brief for the petitioners in *Hurd v. Hodge*. A key sentence on page 8 thereof is as follows:

"Hence the judicial enforcement of restrictive covenants, against willing sellers and willing buyers, *who have never been parties to the covenant,* violates the Constitution." (Emphasis added.)

A key sentence on page 38 of that brief is as follows:

"This case is of narrow legal compass because it involves a conjunction of *three* special elements: (a)

> The District Court is accomplishing that which if done under express legislative sanction would be unconstitutional, AND (b) The restriction is being applied to persons who have never attempted to contract away their constitutional rights AND (b) The restriction is based solely on race." (No emphasis added.)

The principle in question was again emphasized on page 33 of the consolidated brief for petitioners in *Hurd v. Hodge:*

> "(6) PETITIONERS HAVE NOT ATTEMPTED TO CONTRACT AWAY THEIR CONSTITUTIONAL RIGHTS.
>
> ". . . There is no question here involved of whether Urciolo or any of the grantees may have attempted to contract away their constitutional rights with reference to their property. The fact is that neither Urciolo nor any of the grantees has been a party to any such contract."

It is, of course, true that all the briefs filed in the Restrictive Covenant Cases advanced numerous arguments which, if correct, would have rendered the contracts void, but all such arguments were rejected by the reaffirmance of *Corrigan v. Buckley,* 271 U. S. 323, and the *Civil Rights Cases,* 109 U. S. 3, as to the validity of the contracts between the parties. It seems clear, therefore, from the language of the opinions and from the facts before the court and from the briefs of the prevailing parties that the Restrictive Covenant Cases are limited in their application to state action taken against individuals before the court who had not been parties to the contract relied upon, *i.e.,* without their consent.

II.

Opinion of the District Court of Appeal, Second Appellate District, State of California.

After stating the facts and the contentions of the parties, the opinion of the Court below recognized that the law by which the case at bar must be decided is divided into two main departments, *i.e.*, the common law of the State of California, and the Constitution of the United States. On page 32 of the Record the opinion contains this single sentence paragraph:

> "We first consider whether a cause of action is stated for damages for breach of contract under common law principles."

After some discussion the Court made the following holding [R. 34] settling all non-federal questions in favor of petitioners:

> "We hold that apart from the constitutional issue the complaint states a cause of action for damages."

On the same page of the Record the Court below recognized "that the covenant, as such, is constitutionally a valid agreement; . . . ."

Thereafter, the Court below pursued a course of reasoning which led it to the conclusion that the United States Constitution prevents the enforcement of this constitutionally valid contract in any way against the original contracting parties.

This conclusion was reached as a result of several errors in the course of reasoning followed. First, the Court failed to recognize the principle that the constitutionality of any state action is tested by the rights of the individ-

uals before the court only. In the case of *Liverpool, etc., S. S. Co. v. Commissioner of Emigration* (1844), 113 U. S. 33, the governmental action challenged as unconstitutional was an act of Congress (20 Stat. at L. 177) ratifying retroactively state taxes levied and collected on passengers from foreign lands. On page 39 of that opinion the Court stated a fundamental principle of constitutional law as follows:

> "It (this court) has no jurisdiction to pronounce any statute, either of the state or of the United States, void, because irreconciliable with the Constitution, except as it is called upon to adjudge the legal rights of litigants in actual controversies."

This rule has been applied under a variety of factual situations in the following cases:

Liberty Whse. Co. v. Burley T. G. Coop. M. Assn. 276 U. S. 71, at 88;

Tileston v. Ullman, 318 U. S. 44;

Columbus & G. R. Co. v. Miller, 283 U. S. 96, 99-100;

McCabe v. A. T. & S. F. R. R. Co., 235 U. S. 151, 161-162;

Missouri ex rel. Gaines v. Canada, 305 U. S. 337, 351.

In *Ashwander v. T.V.A.* (1935), 294 U. S. 288, 347, this Court stated the rule in these words as applied to a statute:

> "5. The court will not pass upon the validity of a statute upon complaint of one who fails to show that he is injured by its operation (citing cases)."

This rule applies equally in testing state action, whether legislative or judicial.[9] This rule was recognized and followed in *Buchanan v. Warley*, 245 U. S. 60, 73, when the court said:

> "In this case the property rights of the plaintiff in error are directly and necessarily involved."

The opinion of the Court below shows that that Court failed to recognize that the opinions in the Restrictive Covenant Cases followed the above rule. As a consequence, the opinion of the Court below erroneously states on page 35 of the Record the holding concerning the Restrictive Covenant Cases:

> "The admonition of these cases is that a state may not by judicial process enforce private rights derived from consensual agreements of private individuals where to do so would result in the infringement of civil liberties[10] guaranteed by the Constitution of the United States."

This statement is erroneous in that it fails to include the words, "civil liberties of the individuals before the courts," *i.e.*, "litigants." The reality of this error is more apparent in view of the statement on page 36 of the Record:

> "The Supreme Court of the Unied States in these cases [Restrictive Covenant Cases] held: . . . (3)

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[9] "The rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual. The rights established are personal rights."
Shelley v. Kraemer, 334 U. S. 1, 22.

[10] What civil liberties? Petitioners' right to make and enforce contracts is a civil liberty.
Civil Rights Cases, 109 U. S. 3, 22.

> In granting judicial enforcement of such private agreements the courts of Missouri and Michigan acted to deny the excluded *races* the equal protection of the laws, contrary to the Fourteenth Amendment; . . ." (Interpretation and emphasis added.)

This error led the Court below to the equally erroneous belief that the case at bar could be decided upon the supposed rights of the "excluded races" rather than upon the rights of the litigants. This erroneous major premise is evidenced in many other passages of the opinion, *i.e.*, wherever the opinion refers to constitutional rights, it either neglects to specify whose rights, or else specifies rights which could only belong to persons unknown, not parties to this litigation.

After quoting extensively from the opinions in the Restrictive Covenant Cases and from opinions in other jurisdictions, the opinion below then stated the following minor premise on pages 54-55 of the Record:

> "The fact that the non-Caucasion is not a party to the action and that an award of damages operates against a covenantor directly rather than directly against the non-Caucasian, does not affect the result. In an action at law for damages the rights and interests of the particular non-Caucasian would be secure and unaffected by any judgment rendered. *However, enforcement of the covenant would effectively deny non-Caucasian citizens equality in the enjoyment of property rights* because property owners in restricted areas are deterred from permitting use or occupancy by non-Caucasians lest they be personally liable for damages."

From these major and minor premises the opinion of the Court below reached the conclusion that [R. 56]:

> "In the light of the Restrictive Covenant Cases it is the duty of the courts of this state to refrain from exerting judicial power to give legal sanction and effect to racial restrictive covenants in an action at law for damages."

The language above quoted shows that the Court below failed to adjudicate the rights of these litigants in the case at bar. No comment is necessary to establish conclusively the error of the major premise relied upon by the opinion of the Court below. The minor premise, based as it is on speculation and generalities and unsupported by anything in the Record is equally vulnerable to attack. However, this minor premise is so totally irrelevant to the determination of the constitutional questions in this case, *i.e.*, the rights of these litigants, that the impulse to attack it must be resisted.

After recognizing that according to the law of California, plaintiff's complaint states a good cause of action, the opinion in the Court below has failed to find any constitutional right which respondent would be denied by requiring her to go to trial on the issues raised in that complaint.

Other errors appear in the opinion of the Court below, some of which will be noted under later headings of this brief. A few will be noted here. Attention is directed to the following on pages 36 and 37 of the Record:

> "The Supreme Court of the United States in these cases (Restrictive Covenant Cases) held: . . . (4) Denial of access to the courts to enforce such restrictive covenants does not deny equal protection of the laws to the parties to such agreements."

This statement is inaccurate by reason of the fact that it fails to include the additional words: "when such enforcement would deny the defendants their rights to acquire, enjoy, own and dispose of property." This error is material in the case at bar because the respondent would not be denied any rights to acquire, enjoy, own and dispose of property, nor any other constitutional right by the enforcement of her contract in damages against her. Therefore, failure to enforce it in that way deprives petitioners of their property without due process of law.

Attention is also directed to the error in interpreting the opinion in *Gandolfo v. Hartman* (C. C. S. D. Cal., 1892), 49 Fed. 181, as evidenced by the statement on page 35 of the Record that that case held "enforcement of racial restrictive covenants . . . invalid on constitutional grounds." The holding of the *Gandolfo* case was that the contract itself was *"absolutely void"* as (1) contrary to the public policy of the Government, (2) in contravention of a treaty, and (3) in violation of the Constitution. The *Gandolfo* case was cited and relied upon by all petitioners in the Restrictive Covenant Cases and by eight of the briefs *amici curiae*, yet it was not even mentioned in the opinions in those cases except in a footnote and was necessarily repudiated by the express reaffirmance of *Corrigan v. Buckley*, 271 U. S. 323, establishing the validity of the contracts.

Petitioners respectfully submit that upon the authority of the opinions in the Restrictive Covenant Cases the Court below should have reversed the judgment of the trial Court and the order sustaining respondent's demurrer.

III.

Opinions of the Supreme Court of Michigan[11] and of the United States District Court, in and for the District of Columbia.[12]

A. Phillips v. Naff.[11]

Although the opinion in this case contains some erroneous generalities, the result reached is justified. The first basis relied upon by the opinion was the fact that the covenant sued upon was not personal to the owner. It reads, in material part, as follows:

> "The undersigned owners or purchasers of land . . . each does hereby severally covenant . . . *that said lands shall . . . be subject* to the covenants, agreements and restrictions herein contained which shall run with the land." [See p. 6, Record on Appeal in that case.] (Emphasis added.)

The agreement nowhere provides that the signers will be bound by anything, nor that the owners shall be bound by anything. The defendants in *Phillips v. Naff* did not bind themselves that no part of their real property should be used or occupied by non-Caucasians as the respondent at bar did [R. 3]. The defendants in *Phillips v. Naff* were not original contracting parties and did not hold title at the time the land in question was occupied by non-Caucasians. Therefore, the following rule from 15 Cor. Jur. 1301 would apply:

> "As a general rule, liabilities cannot be transferred nor assigned; but there is an exception to this rule in case of covenants running with the lands, in which case a grantee is liable for breaches which occurred

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[11] *Phillips v. Naff*, 332 Mich. 389, 52 N. W. 2d 158.

[12] *Roberts v. Curtis*, 93 Fed. Supp. 604.

"*while he holds the estate in the land.* The original covenantor remains liable and may be sued upon his express covenant, even though they are covenants which run with the land and the land has been assigned." (Emphasis added.)

The Michigan Court pointed out at the end of that first point on page 160 (52 N. W. 2d) that the defendants were not parties to the agreement imposing the restrictions.

The second basis for the decision was reliance upon the opinions in the Restrictive Covenant Cases. The opinion contains many comments which violate the settled rule referred to hereinabove that the constitutionality of state action must be tested by the rights of litigants only.

Beginning with the first paragraph on page 162 (52 N. W. 2d), the Michigan Court began to develop the third objection of the enforcement of the covenant in that case, *i. e.*, indirect restraint upon alienation. The Court based this objection upon a reluctance to sell which would be caused by permitting recovery of damages in that case. The Court failed to notice that the sale had already taken place. The Court also failed to notice that there would be no more of a deterrent to alienation resulting from liability for damages than was caused by the long line of Michigan cases permitting injunction against use and occupancy. What this Michigan Court did, without realizing it, was to reverse the long line of Michigan cases which recognized the distinction between covenants against sale and covenants against use and occupancy; the first being an illegal restraint on alienation and void; the latter being no restraint and valid. It is clear from the first paragraph on page 162 (52 N. W. 2d) of the opinion

that the Court was led into confusing covenants against use and occupancy and covenants against sale.

This third basis for the decision in *Phillips v. Naff* and likewise the first basis mentioned hereinabove involved non-federal questions which could not have been the basis for seeking a writ of certiorari from this Court. In the case at bar all the non-federal questions have been decided in favor of petitioners by the holding on page 34 of the Record that:

> "We hold that apart from the constitutional issue the complaint states a cause of action for damages."

B. Roberts v. Curtis.[12]

It should be noted that this is the opinion of the trial court in the District of Columbia. The very brief opinion written by Judge Holtzoff relies solely upon the Restrictive Covenant Cases. It is apparent from a reading of his opinion that he has misinterpreted the ruling in both cases on the question of enforcibility; and his opinion clearly misstates the holding of the *Hurd* case on the question of public policy. The only policy referred to in the *Hurd* case was the policy of federal courts which prevents federal courts from acting in a way in which state courts could not act because of some constitutional limitation. This Court did not state a policy against the agreement but instead affirmed the *Corrigan* case which held the agreement valid. Nor does it state a public policy against enforcement except where state courts could not enforce it, that is, by injunction without consent of the individuals before the court.

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[12] *Roberts v. Curtis*, 93 Fed. Supp. 604.

The above proposition is made abundantly clear by the summary to the *Hurd* case appearing in 92 L. Ed. page 1187:

> "In a District of Columbia case involving restrictive covenant against Negro ownership or occupancy, the Supreme Court, . . . found it unnecessary to pass upon a contention of violation of the due process provisions of the Fifth Amendment, on the ground that the enforcement of such covenant would (a) violate the Civil Rights Act, which was construed as applicable in the District of Columbia, and (b) be contrary to the public *policy of the United States not to permit action to be taken in federal courts which is forbidden by the Constitution to be taken in state courts.*" (Emphasis added.)

This summary is an accurate statement of the holding of this Court in the *Hurd* case on the question of policy, as is shown by the following language from page 35 of the United States Reports:

> "We are here concerned with action of federal courts of such a nature that *if taken by courts of the state would violate the prohibitory provisions of the Fourteenth Amendment.* Shelley vs. Kramer (U. S.) *supra.* It is not consistent with the public policy of the United States to permit federal courts in the nation's capitol to exercise general equitable powers to compel action denied the state courts where such state action has been held to be violative of the guarantee of the equal protection of the laws." (Emphasis added.)

The same idea is expressed by Mr. Justice Frankfurter in his concurring opinion in the following language:

> "In good conscience, it cannot be 'the exercise of a sound judicial discretion' by a federal court to

grant the relief here asked for *when the authorization of such an injunction by the states of the union violated the Constitution*—and violated it, not for any narrow technical reason, but for considerations that touch rights so basic to our society that, after the Civil War, their protection against invasion by the states was safeguarded by the Constitution." (Emphasis added.)

IV.

Answer to Anticipated Arguments.

A. Respondent's Constitutional Right to Dispose of Her Property.

As has been pointed out heretofore, the constitutionality of state action must be tested by the constitutional rights of the litigants.[13]

The only constitutional right claimed by respondent in the courts below has been this right to dispose of her property. The right to dispose of property, like the right to make and enforce contracts, is a civil right guaranteed by the Fourteenth Amendment to the Constitution of the United States. See *Civil Rights Cases*, 109 U. S. 3, 22, and *Shelley v. Kraemer*, 334 U. S. 1, 10 [R. 37], 19 [R. 39].

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[13] *Liverpool, etc., S. S. Co. v. Commissioners of Emigration*, 113 U. S. 33, 39;
Liberty Whse. Co. v. Burley, etc., Assn., 276 U. S. 71, 88;
Tileson v. Ullman, 318 U. S. 44;
Columbus, etc., Co. v. Miller, 283 U. S. 96, 99-100;
Ashwander v. T.V.A., 297 U. S. 288, 347-348;
McCabe v. A. T. & S. F. R. R. Co., 235 U. S. 151, 161-162;
Missouri ex rel. Gaines v. Canada, 304 U. S. 337, 351;
Buchanan v. Warley, 245 U. S. 60, 73.

This right to dispose of property is one which has received frequent recognition by the courts, both state and federal. It is well expressed in the following two statements quoted by respondent in her brief in the District Court of Appeal, Second Appellate District, State of California:

> "The right to acquire and possess property guaranteed by the Constitution includes the rights to dispose of it *or any part of it.*" (Emphasis added.)
>
> *Tennant v. John Tennant Memorial Home,* 167 Cal. 570, 575.

> "From the very power which a man possesses over his own property, it follows that he can dispose of it in any manner he may see fit . . ."
>
> *Dana v. Stafford,* 10 Cal. 269, 277.

As respondent said in commenting on these quotations, "these are old cases but they have never been overruled precisely because the principle they enunciate is so fixed in our constitutional system."

Petitioners submit that the case at bar has no relation to respondent's right to dispose of her property, or any part of it. It should be noted first, that respondent has fully exercised her right to dispose of her property [R. 4 and 34]. Nowhere in their complaint, nor in their briefs, have petitioners complained of the exercise of this right of respondent to dispose of her property. Petitioners have been damaged by the happening of a contingency which respondent promised would not happen.

Respondent did not promise not to sell to non-Caucasians; but if she had made a promise against sale, that would have raised a non-federal question of restraint on alienations; *it would not have raised any constitutional*

question. The Constitution would permit her to se "any part of her property." To use the helpful illustra tion of a bundle of sticks, the total rights which a perso may have in his property is like a bundle of sticks. Th owner may sell one of these rights and retain the balan of the bundle which she may sell at a later date. How ever, having exercised her constitutional right to sell on of these sticks, she does not thereafter have any constitu tional right to the stick which she has sold. So in th case at bar, if respondent had promised that she woul not dispose of her property to non-Caucasians, she coul not thereafter claim that she still had that constitution right because that stick would have been sold by he promise for consideration. In an action against he alone for damages after sale, she could not say that money judgment against her would deprive her of an constitutional right because she had deprived herself o it by selling it. Under these *assumed* facts responde could make the non-federal defense that her promise wa void in California as a restraint on alienations, but sh would have no *constitutional* defense because she could no be deprived of a constitutional right after having exe cised her constitutional right to sell it.

Under the facts of the case at bar, respondent has n such non-federal defense [R. 34] because her promise one against use and occupancy, which is not a restrai upon alienation;[14] and she has no constitutional defen because *by her contract she has sold whatever proper right which it might be construed to have deprived he*

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[14] *Los Angeles Investment Co. v. Gary,* 181 Cal. 680; *Janss Investment Co. v. Walden* (1925), 196 Cal. 753; *Wyat v. Patee* (1928), 205 Cal. 46.

B. Public Policy.

Although respondent has not advanced the defense that her contract is void as against public policy, that argument was advanced by the brief of *amici curiae* in her behalf filed in the District Court of Appeal, Second Appellate District, State of California; and all of the briefs for petitioners in the Restrictive Covenant Cases and nearly all of the *amici curiae* briefs filed on behalf of petitioners therein contain elaborate and documented arguments on the question of public policy. For this reason it is thought advisable to consider this non-federal question.

Insofar as this case is concerned the question of the validity of the contract sued upon against the attack of public policy was conclusively resolved in petitioners' favor by the holding on page 34 of the Record that:

> "We hold that apart from the constitutional issue the complaint states a cause of action for damages."

The law of California is so well settled on the question of public policy as applied to restrictive covenants that the court below could not have ruled otherwise. At the time of the decision in the case of *Gandolfo v. Hartman*, 49 Fed. 181, a federal court might have felt empowered to reach a conclusion based on the common law power to declare contracts void as against public policy where the state courts held otherwise. However, since the landmark case of *Erie R. R. Co. v. Tompkins* (1938), 304 U. S. 64, 78, it is recognized that no such power exists:

> "There is no federal general common law. Congress has no power to declare substantive rules of common law applicable to a state, whether they be

> local in their nature 'or general,' be they commercial law or a part of the law of torts. And no clause of the Constitution purports to confer such a power upon the federal courts."

As mentioned above, all the briefs for petitioners in the Restrictive Covenant Cases and nearly all of the briefs *amici curiae* filed on behalf of the petitioners therein contained elaborate and documented arguments on the question of public policy and it was seriously urged that the covenants should be declared void for that reason. Yet this Court decided the *Shelley* case on a constitutional question thereby rejecting the public policy arguments. This is even more significant in view of the rule uniformly followed by this Court that:

> "4. The Court will not pass upon a constitutional question although properly presented by the Record, if there is also present some other ground upon which the case may be disposed of. This rule has found most varied application. Thus, if a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the court will decide only the latter."
>
> *Ashwander v. T. V. A.*, 297 U. S. 288, 347.

This Court had this principle in mind when writing the opinions in the Restrictive Covenant Cases as evidenced by footnote 6 to *Hurd v. Hodge*, 334 U. S. 24 at 30.

Finally, both opinions in the Restrictive Covenant Cases confirmed the case of *Corrigan v. Buckley*, 271 U. S. 323, on the question of validity.

C. United Nations Charter.

Since nearly all of the briefs filed on behalf of petitioners in the Restrictive Covenant Cases insisted that the covenants were void because of the United Nations Charter, it may be expected that these arguments will likewise be advanced by the respondent or by *amici curiae* in her behalf. Like the public policy argument, this contention was also rejected by this Court by basing its decision in *Shelley v. Kraemer* upon constitutional grounds.[15]

It is clear that the United Nations Charter is not self-executing.

> "The treaty is, in its nature, a contract between two nations, not a legislative act: It does not generally effect, of itself, the object to be accomplished; especially, so far as its operation is infra-territorial; but is carried into execution by the sovereign power of the respective parties to the instrument. In the United States a different principle is established. Our Constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in courts of justice as equivalent to an act of the legislature whenever it operates of itself, without the aid of any legislative provision. But when the terms of the stipulation import a contract—*when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial department;* and the legislature must execute the contract, before it can become a rule of the court."
>
> *Foster v. Neilson* (1829), 27 U. S. 64 (2 Pet. 253, 313-314).

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[15] *Ashwander v. T.V.A.*, 297 U. S. 288, 347.

See also:

Edye v. Robertson (1884), 112 U. S. 580;

Robertson v. General Elec. Co. (1929), 32 F. 2d 495;

Ex parte Dove, 49 F. 2d 816;

Aguilar v. Standard Oil (1943), 318 U. S. 724, 728;

Fujii v. State of California (1952), 38 Cal. 718;

48 Mich. L. R. (April, 1950), 852.

Concerning the provisions of Article 55 of the United Nations Charter, Professor Joseph L. Kunz, a member of the Board of Editors of the American Journal of International Law, stated:

> "They do not constitute legal norms, but only guiding principles. The 'United Nations shall promote and encourage,' 'assist in the realization,' 'make recommendations,' 'promote universal respect and observance of human rights;' it cannot protect them, it cannot take action apart from the case that the violation of human rights constitutes a danger to peace . . .
>
> "As the corresponding articles of United Nations Charter contain only a program of peace, not legal norms, and as they do not define these rights and fundamental freedoms, it is obviously necessary to create legally binding norms, defining these rights, taking them out of the matters essentially within domestic jurisdiction and establishing a machinery of international enforcement." (43 Am. Jur. Int. Law 316, 317-318.)

In his report to the President concerning the United Nations Charter, Edward R. Stettinius, Jr., Secretary

of State and Chairman of the United Nations Delegation to the San Francisco Conference, said:

> "On the other hand, the view was advanced that the further elements in the Australian proposal calling for national action separate from the international organization went beyond the proper scope of the charter of an international organization and possibly even infringed on the domestic jurisdiction of member states in committing them to a particular philosophy of the relationship between the government and the individual.
>
> "The pledge as finally adopted was worded to eliminate such possible interpretation. It pledges the various countries to cooperate with the organization by joint and separate action in the achievement of the economic and social objectives of the organization *without infringing upon their right to order their national affairs according to their own best ability, in their own way, and in accordance with their own political and economic institutions and processes.*
>
> "To remove all possible doubt on this score the following statement was unanimously approved and included in the record of the Conference (Report of the Rapporteur of Committee 3 of Commission II):
>
> "'The members of Committee 3 of Commission II are in full agreement that nothing contained in Chapter IX [which contains Articles 55 and 56] can be construed as giving authority to the organization to intervene in the domestic affairs of domestic states.'" (Emphasis added.) (Hearings before the Committee on Foreign Relations U. S. Senate—Revised—July 9-13, p. 34, 105-106.)

The briefs in support of the petitioners in the Restrictive Covenant Cases attached considerable importance

to the holding of a trial judge in *Re* Drummond Wren, Ontario R. 778, 4 D. L. R. (1945) 674, as to the effect of public policy and the United Nations Charter on restrictive covenants. This case was never appealed but the opinion was cited and completely repudiated by the Court of Appeal of Ontario in *Re* Noble and Wolf, Ontario Weekly Notes (1949) at page 484. The following is quoted from page 487 of the Ontario Weekly Notes (1949) as part of the report of the latter case:

> "Henderson, J. A., after stating the facts said that in his opinion the reasons for judgment of Schroeder, J., were right and the judgment in *re* Drummond Wren, *supra,* was wrong in law and should not be followed."

From page 488 of the same report:

> "Hope, J. A., said he agreed fully with Robertson, C. J. O., and with the conclusion reached by other members of the court. In view of the reliance placed on the decision in *re* Drummond Wren, *supra,* his Lordship wished to add that in his opinion freedom of the individual in and under a democracy had implicit in it, as an absolute, the freedom of association (citing authorities).

And from page 489 of the same report:

> "The present case, in his Lordship's opinion (Hogg, J. A.) cannot be brought within any of the classes to which the principle of public policy, as recognized by law, was applicable. It was urged that the doctrine of public policy should be extended because of

the principles expressed and adopted in the various international charters and documents mentioned in *re* Drummond Wren, *supra,* and because of the opinions expressed in judgments of the Supreme Court of the United States. In this respect his Lordship agreed with Schroeder, J., and he could not conclude that the covenant now under consideration could be held void upon the grounds of public policy." (Interpretation added.)

Re Noble and Wolf, supra, was appealed to the Supreme Court of Canada and is reported in Canada Law Reports as *Noble, et al. v. Alley* (1951), S. C. R. 64. The opinion of the Court of Appeal of Ontario on the questions of public policy and the United Nations Charter was not disturbed by the opinion of the Supreme Court of Canada. However, the Supreme Court of Canada held that the covenant sued upon was void as a restraint on alienation (covenant against sale) and unenforcible for uncertainty and did not touch and concern the land and therefore did not run with the land and for these reasons the lower courts were reversed. All of the objections sustained by the Supreme Court of Canada would be non-federal questions in the United States and have been conclusively decided in petitioners' favor by the court below [R. 34].

It would appear that the United Nations Charter is not considered self operating in Canada any more than it is in the United States.

V.

Respondent's Brief on Certiorari.

In view of the arguments heretofore presented in this brief it is not felt that comment upon respondent's brief on certiorari is necessary except as to the following statement on page 7 thereof:

> "At this posture of the case petitioners interject the contention that respondent is bound by her 'contract' and that she 'waived' her civil right to dispose of her property as she saw fit."

Petitioners wish to make clear that they do not rely on a mere "waiver." As pointed out in Point IV(A) above, if respondent lost any right to dispose of her property, it was because she sold that particular right from her bundle of rights, which she had a constitutional right to do. The word "waiver" is often loosely used and is frequently used to refer to situations where no actual consent by contract exists, and sometimes where consent cannot even be implied. It is likely, then, that respondent could produce cases villifying "waiver" in these non-consensual cases and try to apply them to this case, although the only similarity would be this word "waiver" introduced by respondent herself.

The word "waiver" is sometimes used in a sense that might apply to the case at bar. An example may be drawn from the long and scholarly brief filed by one of respondent's counsel in the District Court of Appeal, Second Appellate District, in the case of *Anderson v. Auseth*, L. A. 19759. At page 35 thereof the following appears:

> "It seems plain, then, that in view of the provisions of the state constitution an owner of land may not be forbidden to use his own land unless he waives that

right, *either by becoming signatory to the agreement* or through failing to assert his right at the very earliest moment open to him."

Petitioners respectfully submit that whatever state action occurs in the case at bar occurs by respondent's express consent by a contract which is valid both under the Constitution [R. 34][16] and the common law of California [R. 34].

The controlling influence of consent may be illustrated by quotations from a few cases:

> "A lien under a levy is a vested right of which one cannot be deprived without his *consent.*" (Emphasis added.)
>
> *In re Bear* (1881), 8 Fed. 429.

> "Holder of stock on which cumulative dividends has accrued has vested rights, which may not, *in absence of prior consent,* be extinguished, in corporate surplus which might be applied in payment thereto." (Emphasis added.)
>
> *Yoakum v. Province Baltimore Hotel* (1929), 34 F. 2d 533.

> "It must be conceded, however, that where the United States becomes a party to commercial paper, it impliedly *consents* to be bound by the same rules governing private persons under the same circumstances." (Emphasis added.)
>
> *United States v. First National Bank* (1942), 131 F. 2d 985 at 987.

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[16] *Buchanan v. Warley*, 245 U. S. 60; *Shelley v. Kraemer*, 334 U. S. 1.

"6. The court will not pass upon the constitutionality of a statute at the instance of one who has availed himself of its benefits. (Citing cases.)"

Ashwander v. T. V. A. (1935), 297 U. S. 288, 347.

This last citation has reference to implied consent. How much more obvious would the rule be if the individual before the court had expressly ratified the statute by his valid contract? In the case at bar respondent has availed herself of her constitutionally guaranteed civil right to make and enforce this contract and has enjoyed it since 1944. She has no color of right which would be denied equal protection by the state action sought in the case at bar. If any could be imagined, respondent has sold it.

"It is, of course, true that any man may contract freely with reference to his property; he may even bargain away his own constitutional rights in the process."

Loren Miller, "Race Restrictions on Ownership or Occupancy of Land," 7 Lawy. Guild Rev. 99, 108 (May-June, 1947).

"'. . . but if the state court will compel the white man not to sell to a Negro, even though he is now willing to do so, because the white man has covenanted with other white owners not to do so, the state is defeating the Negro's interest in the white man's freedom, to which the Negro is supposed to have a constitutional right. . . . The parties to the covenant have given up, not only their own constitutional

rights, *as they may well do,* but also the constitutional rights of other people. . . . .' Hale, Rights Under the Fourteenth and Fifteenth Amendment Against Injuries Inflicted by Private Individuals, 6 Lawy. Guild Rev. 627, 633-4 (1946)."[17]

The above is quoted from pages 25-26 of the brief of the American Civil Liberties Union *amicus curiae* filed on behalf of petitioner in the Restrictive Covenant Cases. (Emphasis is added to the phrase considered significant here.)

A slight deviation from our subject is considered necessary at this point in order to clarify the first sentence quoted above from Prof. Hale. That sentence contemplates a state of facts such as existed in the case of *Corrigan v. Buckley,* 271 U. S. 323, where the white defendant seller was a party signatory of the contract and the remedy sought was injunction against a willing seller and a willing buyer. Only by injunction can the court "compel the white man not to sell to a Negro" and only in an action for injunction would any right of the Negro be within the jurisdiction of the court to determine. In

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[17]A similar idea is expressed in the article by Professor McGovney, "Racial Residential Segregation," 33 California Law Review, 5, 21:

> *"There is nothing unjust in holding him [the contracting party] to his bargain insofar as he alone is concerned,* but the state is denied power to enforce it [the covenant] because enforcement would work a prohibited discrimination against the buyer because of his race." (Emphasis and interpretation added.)

an action for damages against the contracting party only, the Negro would not be prevented from buying but instead, would already have purchased [R. 55],[17a] and it is absurd to suggest that the Negro has a "constitutional right" in the "white man's freedom,"[18] but in any event his rights would not be before the court.[19]

VI.

Petitioners and Respondent Have a Constitutionally Guaranteed Property and Civil Right to Make and Enforce Their Contract.

A contract between petitioners and respondent has been alleged: These allegations are admitted by the demurrer. The Court below has made the conclusive holding on the non-federal question that a cause of action for damages for breach of a valid contract is stated [R. 32 and 34]. Under these circumstances petitioners have constitutionally

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[17a]When non-Caucasions are protected in the use and ownership of their own property, after they have acquired it, or contracted to acquire it, their constitutional rights are satisfied.

[18]"The rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual. The rights established are personal rights."

Shelley v. Kraemer, 334 U. S. 1, 22.

[19]*Liverpool, etc., S. S. Co. v. Commissioner of Emigration,* 113 U. S. 33, 39;

Ashwander v. T.V.A.; 294 U. S. 288, 347-348;

Missouri ex rel. Gaines v. Canada, 305 U. S. 337, 351.

recognized and protected property rights.[20] Of the "fundamental rights which are the essence of civil freedom" enumerated by this court in the opinion in the *Civil Rights Cases,* 109 U. S. 3 at 22, the first civil right on the list is the "right to make and enforce contracts." It is inconceivable that a court of law would expressly hold that a contract is valid and that the complaint states a cause of action and yet refuses to enforce it against the original contracting parties. The Court below would not have refused to do so had it not been for the erroneous

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[20] "Valid contracts are property, . . ."
Lynch v. United States (1934), 292 U. S. 571, 580.

See:
Allen v. City of Detroit, 167 Mich. 464, 133 N. W. 317.

"The idea of validity and remedy are inseparable, and both are parts of the obligation, which is guaranteed by the Constitution against invasion."
Home Bldg. & Loan Assn. v. Blaisdell (1933), 290 U. S. 398, 430;
Von Hoffman v. Quincy, 4 Wall. 535, 550, 552, 18 L. Ed. 403, 408-409.

See also:
Walker v. Whitehead, 16 Wall. 314, 317, 21 L. Ed. 357, 358.

"It is true the Legislature may not withdraw all remedies, and thus, in effect, destroy the contract; . . ." (Emphasis added.)
Oshkosh Water Works Co. v. Oshkosh, 187 U. S. 437, 439, 47 L. Ed. 249, 250.

"It is true that what is prohibited (by the obligation of contracts clause) is legislative action . . . *The power that is here denied the legislature was not reserved to the courts* . . . it is yet to be suggested that included in these powers (of courts) is the power to nullify or impair a *legal contract* solemnly and intelligently entered into between competent parties." (Interpretation added.) (Emphasis added)
Galey v. Guffey, 248 Pa. 523, 528, 94 Atl. 238.

belief that the Constitution of the United States would not permit the enforcement sought. The fallacy of this belief is pointed out hereinabove and it is clear that where no valid reason exists for the refusal of the court below to permit a trial on the merits, the petitioners have been deprived of their property without due process of law.

The consent of respondent to the state action sought is commented upon in the opinion of the Court below on page 55 of the Record as follows:

> "An individual cannot consent to state court action, the purpose and effect of which is to aid in discrimination based solely on race, to entrench segregation and *thus deny to a class of citizens* the equal protection of the law." (Emphasis added.)

The court below has already held that a valid contract existed between petitioners and respondents [R. 32-34]. It is a contradiction of terms to say that the petitioner has not consented because consent is one of the elements necessary to the existence of the valid contract. If in fact consent were lacking, it would be a matter of defense to be set up in the answer and determined at the trial. The existence of respondent's actual consent is a factual matter conclusively proven by her signature. *It is clear that the Court below is again basing its conclusion upon the erroneous premise that "a class of citizens" not parties to this action have rights in this matter.*

We continue the above quotation [R. 55]:

> "The law which prohibits the end will not lend its aid in promoting the means designed to carry it into effect."

The end sought by petitioners in this action is to recover the loss they have sustained as a result of the breach

of respondent's valid contract. The court below is again trying some other case rather than the case between these litigants.

It is irrelevant to speculate on the effect of a judgment for petitioners on strangers to this action, but even the speculation indulged in fails to comport with many indisputable facts;[21] one of which is that restrictive covenants do not prevent use and occupancy by non-Caucasians. Assuming such an irrelevant tendency, the premise that "the law prohibits the end" is untenable. What law prohibits "the end?"

> "It is admitted that the Federal Constitution did not preclude the owner of any piece of property sought to be covered by such agreement from freely picking and choosing among the persons whom he would permit to use or occupy his property as guests, lessees or purchasers on the basis of race, religion, color, personality, education, occupation or on the basis of absolute whim and utter caprice." (Brief for petitioners in *McGee v. Sipes*, p. 34, fn. 49.)

Whatever respondent had a constitutional right to do she had a constitutional right to promise to do.

> "It is obvious that none of these amendments prohibited private individuals from entering into contracts respecting the control and disposition of their own property, . . ."
>
> *Corrigan v. Buckley*, 271 U. S. 323, 330.

> "To say that the Constitution forbids direct and actual *enforcement* of a racial covenant by injunc-

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[21]The impulse to elaborate on this speculation which formed the minor premise of the decision below must again be resisted due to its irrelevance to the constitutional rights of these litigants.

> tion—the only remedy which is intended to and necessarily does prevent Negroes from acquiring and using the restricted property—is not to say that it forbids awarding to a neighboring property owner such damages, if any, as an executed sale to a Negro may be shown to have caused."

Dissent of Edgerton, A. J., in *Hurd v. Hodge*, 162 F. 2d 233, 240, Note 22.

There is no justification either in reason or in precedent to assert that the "law prohibits the end" contemplated by the irrelevant speculation of the opinion below. The only precedent relied upon is *Shelley v. Kraemer* which (Petitioners respectfully submit) is not authority for that statement. The *Shelley* case was concerned with a "means" only. Nothing but the "means" as it affected those "petitioners" was before the court. The *Shelley* case would only be authority in a case where litigants similarly situated, *i. e.*, non-consenting, were affected by the same "means." The *Shelley* case outlawed no "end." On the contrary, it reaffirmed *Corrigan v. Buckley.*

All of the speculation indulged in by the opinion below regarding the supposed indirect effect of the case at bar upon persons unknown not parties to this action is irrelevant to a determination of the constitutional rights of these litigants.

> "The policy of protecting contracts against impairments *presupposes the maintenance of a government by virtue of which contractual relations are worth while,* . . . ." (Emphasis added.)
>
> *Home Building & Loan Assn. v. Blaisdell* (1933), 290 U. S. 398, 435, 78 L. Ed. 357, 427.

Conclusion.

Nothing should be permitted to obscure the fact that respondent must satisfy this Court that the court action sought by petitioners would deprive her, not another or others, of the equal protection of some constitutional right. Surely it must be clear that the contrary is true. All state action sought has been expressly contracted for. The Constitution itself assumes the enforcibility of valid contracts in courts of law as a premise.

Petitioners respectfully request that the judgment of the District Court of Appeal, Second Appellate District, State of California, be reversed with appropriate order.

Respectfully submitted,

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